In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1638

GENNARO J. COPPOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1970. A petition for rehearing was denied on May 6, 1970. The petition for a writ of certiorari was filed on June 1, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court could properly charge the jury that it could infer from possession in one state of bonds recently stolen in another state that the

possessor had knowledge that the bonds were stolen and was a party to the interstate transportation of the property.

2. Whether the court erred in allowing a government witness to testify why he had been reluctant to appear as a witness.

STATEMENT

After a jury trial in the District of Connecticut, petitioner and John W. Connelly were convicted under two counts of an indictment charging the interstate transportation of stolen bonds in violation of 18 U.S.C. 2314 and the receipt and pledge, as security for a loan, bonds which were part of interstate commerce in violation of 18 U.S.C. 2315.[1] On January 29, 1968, petitioner was sentenced to imprisonment for ten years and fined $10,000 on each count, the terms of imprisonment to run concurrently.

1. In February 1967, Anthony Testo was deeply in debt and needed money for his drugstore in the Bridgeport-Fairfield, Connecticut area (1 R. 503–506). Petitioner, his long-time friend, showed him a list of bonds which he offered to supply as collateral for bank loans (1 R. 508–511). Petitioner said he could borrow these bonds from his friends "in the City" (2 R. 626, 628–630). On February 23, petitioner gave Testo a $5,000 bond, which the latter took to a Connecticut Bank and pledged for a loan (1 R. 519–520, 527–528). Testo thereafter gave petitioner $1,000 for supplying the bond (1 R. 539).

[1] They were also convicted of conspiracy under a second indictment but this was reversed on appeal.

In early March 1967, petitioner and codefendant Connelly met Testo several times in Fairfield, Connecticut. They told him they could get some bonds from some friends in New York "down the line." Petitioner made a phone call to someone staying in a motel "down the line" to be sure (1 R. 556–557; 2 R. 575–576, 630–631). About a week later, petitioner brought four $5,000 bonds to Testo, which the latter pledged for a $14,000 loan (2 R. 589). Thereafter Testo gave petitioner and Connelly $6,000 (2 R. 604–605).

Several days later, Testo attempted to pledge three $10,000 bonds which had been supplied by petitioner and Connelly. A bank employee who became suspicious because the bonds had matured, called the FBI. On March 9, an FBI agent questioned Testo and told him that the bonds were stolen. That evening, when petitioner told Testo that he had more bonds available, Testo notified the FBI. The next day, petitioner and Connelly were apprehended when they arrived to meet Testo outside the bank. They had five $5,000 bonds in their possession (5 R. 1566–1569). All the bonds involved had disappeared from the vault of a New York brokerage firm between August 26, 1966, and October 25, 1966.

2. The court in its instructions charged the jury as follows (9 R. 34–37):

> * * * I charge you that the possession in one state of property recently stolen in another state, if not satisfactorily explained is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in light of all the surrounding circumstances shown by

the evidence in the case, that the person or persons in possession transported the property in interstate commerce.

If the jury should find beyond a reasonable doubt from the evidence in the case that the bonds described in the indictment were recently stolen in New York and the bonds were in the possession of the accused in Connecticut, the jury would ordinarily be justified in drawing from those facts the inference that the accused transported the bonds from New York to Connecticut unless possession of the recently stolen bonds by the accused in Connecticut is explained to the satisfaction of the jury by other facts and circumstances in evidence in the case.

I hasten to add that no defendant has any burden of explaining his possession, if you find that defendants were possessed of the bonds * * *.

* * * * *

This inference of interstate transportation is what the law calls a permissive inference. From the fact of possession in one state of property recently stolen in another state you may infer that the possessor transported the property in interstate commerce; but and this must be absolutely crystal clear to the jury you are not required to draw such an inference. It is entirely up to you whether you do so or not.

Furthermore, in determining whether you will draw the inference here, you should consider, among other things, whether the possession of the stolen property in Connecticut, if you find "possession" and if you find that the bonds were stolen, was sufficiently "recent" to warrant your

> drawing the inference. The term "recent" or "recently" is a relative term which has no fact meaning. Whether property may be considered as recently stolen depends upon the nature of the property and on the facts and circumstances shown by the evidence. Obviously, the longer the period of time since the theft, the less justification there is for drawing the inference.

The court gave a similar instruction concerning the issue whether the defendants knew that the bonds were stolen (9 R. 38–39), and charged the jury in like fashion on the count dealing with the pledge of the bonds (9 R. 49–50). The court also advised the jury that petitioner could be convicted if he aided and abetted the commission of the crime charged (9 R. 54–55).

ARGUMENT

1. The trial court properly permitted the jury to infer from petitioner's possession of the bonds that he transported the bonds from New York into Connecticut and that he knew that the bonds were stolen. In so instructing the jury, the court followed recognized principles of criminal law. As long ago as 1896, this Court said in *Wilson* v. *United States,* 162 U.S. 613, 619:

> Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence.

This ruling was followed in the recent case of *Rugendorf* v. *United States,* 376 U.S. 528, 536–537. It has been applied by the courts of appeals in prosecutions both under the instant and related statutes. See, *e.g., Anderson* v. *United States,* 406 F. 2d 529, 535 (C.A. 8); *Sewell* v. *United States,* 406 F. 2d 1289, 1294 (C.A. 8); *Kowalewski* v. *United States,* 418 F. 2d 118, 121 (C.A. 9); *Herman* v. *United States,* 289 F. 2d 362, 367 (C.A. 5), certiorari denied, 368 U.S. 897.[2]

State and federal bonds are normally sold and transferred through recognized channels of commerce. It was, therefore, rational for the jury to conclude that possession of the bonds, of the face value of $5,000 and $10,000, was guilty possession. From the fact of possession of such bonds in Connecticut a short time after they were stolen in New York, a jury could properly find that the possessor knew they were stolen and that the possessor either transported or aided and abetted this transportation from New York to Connecticut. Nothing in *Leary* v. *United States,* 395 U.S. 6, nor *Turner* v. *United States,* 396 U.S. 398, is to the contrary. Both of those cases involved statutory presumptions which, in the absence of statute, might not have been drawn by a court and jury. Here to the contrary, the inference is one which courts have long found to be justified. To draw such an inference

[2] This case is unlike *Bollenbach* v. *United States,* 326 U.S. 607, where the court charged that possession of stolen property raised a "presumption" of guilt. Such a mandatory deduction is quite different from the permissible inference as to which the court instructed here that a jury could infer guilt from recent possession of stolen property. See *Harding* v. *United States,* 337 F. 2d 254, 257 (C.A. 8).

from possession was, as the court below found, "supported by common sense and every day experience." In any case, the inference here satisfied the "rational connection" test restated in *Leary*.

The fact that there was a four to six month interval from the time of the theft to the time of petitioner's possession was not too long a period from which to infer guilty knowledge. As the court said in *Lee* v. *United States*, 363 F. 2d 469, 474–475 (C.A. 8), certiorari denied, 385 U.S. 947, where there was a five month lapse of time in a case involving stolen securities: "The facts and circumstances of each case must determine whether the doctrine of possession of recently stolen property is to be applied."

Actually, in this case, the references to the "City" and "down the line," the circumstances under which the bonds were given to Testo and the fees received, would all support the conviction even without reliance on the presumption.

2. An employee of Testo, one Gulli, corroborated some of the testimony of Testo. Gulli's testimony indicated reluctance and the prosecutor had him admit that he had been reluctant to testify. Counsel for Connelly and the prosecutor then brought out that he was reluctant to testify because the defendant Coppola was a friend of Testo, that Testo had borrowed money from Coppola; that he, the witness, had not been in federal court before; and that the defendants were "big shots" (8 R. 2179–2185). These circumstances, we submit, do not support petitioner's argument that the government placed his character in issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

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